

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals  
for the Second Circuit, held at the Thurgood Marshall United  
States Courthouse, 40 Foley Square, in the City of New York,  
on the 20<sup>th</sup> day of May, two thousand fourteen.

PRESENT: DENNIS JACOBS,  
ROBERT D. SACK,  
GERARD E. LYNCH,  
Circuit Judges.

- - - - -X  
PAULINE SCHWARTZ,  
Plaintiff-Appellee,

-v.-

13-2870

JAMES MARCANTONATOS, JONATHAN CHIN,  
Shield No. 240, JULIO SANTIAGO, Shield  
No. 23556, Individually and in Their  
Official Capacities, MICHAEL VOSS,  
Shield No. 25617, Individually and in  
Their Official Capacities,  
Defendant-Appellants,

THE CITY OF NEW YORK, JOHN DOES 1-10,  
Individually and in Their Official  
Capacities, JANE DOES 1-10,  
Individually and in Their Official

1 Capacities, (the name Jane Doe being  
2 fictitious as the true name are  
3 presently unknown),  
4 Defendants.

5 - - - - -X

6  
7 **FOR APPELLANTS:** VICTORIA SCALZO (Kristin M.  
8 Helmers and Andrew Lucas, on the  
9 brief), for Michael A. Cardozo,  
10 Corporation Counsel of the City  
11 of New York, New York, New York.  
12

13 **FOR APPELLEE:** GABRIEL P. HARVIS (Scott A.  
14 Korenbaum, on the brief), Harvis  
15 Wright & Fett LLP, New York, New  
16 York.  
17

18 Appeal from a judgment of the United States District  
19 Court for the Southern District of New York (Hellerstein,  
20 J.).  
21

22 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
23 **AND DECREED** that the judgment of the district court be  
24 **AFFIRMED.**  
25

26 Officers Marcantonatos, Chin, Santiago, and Voss appeal  
27 from the judgment of the United States District Court for  
28 the Southern District of New York (Hellerstein, J.), denying  
29 their motions for summary judgment on the ground of  
30 qualified immunity. We assume the parties' familiarity with  
31 the underlying facts, the procedural history, and the issues  
32 presented for review.  
33

34 For purposes of this interlocutory appeal, we must  
35 accept as true the plaintiff's version of the facts. See,  
36 e.g., Loria v. Gorman, 306 F.3d 1271, 1280 (2d Cir. 2002)  
37 ("[E]ven if the district court finds that material issues of  
38 fact exist, we may still exercise interlocutory jurisdiction  
39 if the defendant . . . contends that he is entitled to  
40 qualified immunity even under plaintiff's version of the  
41 facts." (quotation marks omitted)). On May 29, 2011, police  
42 officers in New York's Central Park precinct conducted a  
43 "lucky bag" operation as part of a program to deter  
44 unattended-property crimes. In these operations,  
45 plainclothes police leave an unattended bag or wallet in the  
46 open and wait to see if somebody picks it up. Arrest is

1 made if the finder exhibits an intent to steal it; usually  
2 this involves "separation," that is, the suspect discards  
3 the bag after removing something from the bag.  
4

5 On May 29, 2011, the defendant police officers left an  
6 unattended bag near a bench in the Poets' Walk area of the  
7 park. Pauline Schwartz sat on the bench, noticed the bag,  
8 picked up the bag, and placed it in a plastic grocery bag.<sup>1</sup>  
9 At no point did she open the bag or look inside. There were  
10 no uniformed police officers nearby and Schwartz began to  
11 walk in the direction of the nearby Dairy Visitor Center.  
12

13 Because there was no "separation," Lieutenant  
14 Marcantonatos employed a ruse to determine whether Schwartz  
15 intended to steal the bag. He approached her on a bicycle--  
16 in an area of the park where bicycle riding is prohibited--  
17 and asked Schwartz if she happened to pick up his wife's  
18 bag. Schwartz replied in the negative. In Marcantonatos's  
19 experience, the suspect usually asks for a description of  
20 the bag and hands it over if an accurate description is  
21 provided. This was the first time Marcantonatos encountered  
22 a denial. But a reasonable officer should consider that,  
23 with no "wife" in sight, Schwartz would have been reluctant  
24 to hand the bag to any man who demands it.  
25

26 At that point, Schwartz started to walk a few steps;  
27 the other officers approached and Schwartz noticed that one  
28 was wearing a badge. Schwartz claimed to be taking the bag  
29 to the Dairy Visitor Center to turn it in, but the officers  
30 decided to arrest her. Schwartz spent four hours in custody  
31 at a nearby police station and had to defend a criminal  
32 charge for petit larceny until such time as she agreed to  
33 accept an adjournment in contemplation of dismissal.  
34

35 In this § 1983 action against the City of New York and  
36 the individual officers, Schwartz claims they violated her

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<sup>1</sup> Schwartz claims the unattended bag was filthy and that she put it in a bag to keep from having to hold it in her hands. The officers acknowledge the bag has been used in similar operations for some time and has, on occasion, been thrown in the trash. Nevertheless, probable cause is based only on the facts known to the officers in making their decision to arrest--any explanation Schwartz had for placing the bag in another bag is irrelevant to our analysis.

1 Fourth and Fourteenth Amendment rights. The district court  
2 denied the motion by the individual officers for summary  
3 judgment on the ground of qualified immunity, ruling that  
4 there were genuine issues of material fact regarding the  
5 exchange between Schwartz and Marcantonatos; this  
6 interlocutory appeal followed. We review a district court's  
7 summary judgment decision *de novo*, construing the evidence  
8 in the light most favorable to the non-moving party. See  
9 Vincent v. The Money Store, 736 F.3d 88, 96 (2d Cir. 2013).

10  
11 "Qualified immunity protects officials from liability  
12 for civil damages as long as 'their conduct does not violate  
13 clearly established statutory or constitutional rights of  
14 which a reasonable person would have known.'" Gilles v.  
15 Repicky, 511 F.3d 239, 243 (2d Cir. 2007) (quoting Harlow v.  
16 Fitzgerald, 457 U.S. 800, 818 (1982)). "[A] police officer  
17 is entitled to qualified immunity where (1) his conduct does  
18 not violate clearly established statutory or constitutional  
19 rights of which a reasonable person would have known, or (2)  
20 it was objectively reasonable for him to believe that his  
21 actions were lawful at the time of the challenged act."  
22 Jenkins v. City of New York, 478 F.3d 76, 87 (2d Cir. 2007)  
23 (quotation marks omitted).

24  
25 "There is no doubt that the right to be free from  
26 arrest without probable cause was clearly established at the  
27 time of [Schwartz's] arrest." Id. "Probable cause to  
28 arrest exists when the authorities have knowledge or  
29 reasonably trustworthy information sufficient to warrant a  
30 person of reasonable caution in the belief that an offense  
31 has been committed by the person to be arrested." Lennon v.  
32 Miller, 66 F.3d 416, 424 (2d Cir. 1995) (quotation marks  
33 omitted). "While probable cause requires more than a mere  
34 suspicion of wrongdoing, its focus is on probabilities, not  
35 hard certainties." Walczyk v. Rio, 496 F.3d 139, 156 (2d  
36 Cir. 2007) (internal citations and quotation marks omitted).  
37 "[O]ur inquiry is an objective that focuses on the facts  
38 available to the arresting officer at the time of the  
39 arrest." See Finigan v. Marshall, 574 F.3d 57, 61-62 (2d  
40 Cir. 2009).

41  
42 The issue is whether the probable cause determination  
43 was reasonable; accordingly "'arguable probable cause' will  
44 suffice to confer qualified immunity for [an] arrest."  
45 Escalera v. Lunn, 361 F.3d 737, 743 (2d Cir. 2007). This  
46 test is "more favorable to the officers than the one for  
47 probable cause," id.; however, "'[a]rguable' probable cause

1 should not be misunderstood to mean 'almost' probable  
2 cause," Jenkins, 478 F.3d at 87. "Arguable probable cause  
3 exists if either (a) it was objectively reasonable for the  
4 officer to believe that probable cause existed, or (b)  
5 officers of reasonable competence could disagree on whether  
6 the probable cause test was met." Escalera, 361 F.3d at  
7 743.

8  
9 The officers claim they had probable cause (actual or  
10 arguable) because Schwartz: 1) picked up the bag; 2) placed  
11 it inside another bag; 3) walked away; and 4) denied having  
12 the bag. However, other circumstances known to the officers  
13 prior to their decision to arrest Schwartz militate against  
14 granting them qualified immunity. Schwartz took nothing out  
15 of the bag (no "separation"), and never opened it or looked  
16 inside. The officers relied on Schwartz denying possession,  
17 and not asking Marcantonatos to describe the bag. However,  
18 that reaction to what could have been a scam does not  
19 bespeak theft. In the scenario, *created by the officers*, a  
20 woman in possession of an apparently lost handbag refuses to  
21 turn it over to a stranger illegally riding a bicycle, who  
22 claims it belongs to his wife, with no apparent spouse in  
23 view. By disclaiming possession of the bag, Schwartz  
24 reduced the risk that a real thief would snatch it, or would  
25 take it even if he could not describe it.

26  
27 Schwartz told the arresting officers that she planned  
28 to take the bag to the visitor center. Common sense and  
29 police experience confirm that a thief will often tell  
30 police that they intended to turn the bag over to the  
31 authorities. However, the officers failed to consider the  
32 honest alternative. Cf. Provost v. City of Newburgh, 262  
33 F.3d 146, 158 (2d cir. 2001) ("[A]n officer who concedes the  
34 possibility that there were justifiable reasons for  
35 disruptive conduct underlying a plaintiff's arrest is hard-  
36 pressed to establish that he had probable cause as a matter  
37 of law on the intent element of [the disorderly conduct  
38 statute]."). Schwartz walked away from the bench in the  
39 direction of the Dairy Visitor Center, and was mere steps  
40 away from it.

41  
42 Based only on the plaintiff's version of the facts, the  
43 officers had neither probable cause nor arguable probable  
44 cause. Therefore, we conclude that at this stage of the  
45 litigation they do not enjoy qualified immunity. In so  
46 concluding, we of course do not preclude the possibility

1     that factual findings made later in the litigation resolving  
2     the disputed material facts may justify qualified immunity.  
3

4             For the foregoing reasons, and finding no merit in the  
5     officers' other arguments, we hereby **AFFIRM** the judgment of  
6     the district court.  
7

8                     FOR THE COURT:

9                     CATHERINE O'HAGAN WOLFE, CLERK  
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